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No. 94-1058

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1994

WILLIAM DOUGLAS CARTER,

Petitioner,

V.

WILLIAM T. BURCH,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF

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MISSTATEMENTS IN OPPOSITION BRIEF

Respondent Burch injects in his Brief in Opposition selective facts, outside the record in this case,[1] regarding the underlying criminal case in an effort to divert attention from the issues on appeal. Many of the facts are irrelevant to this appeal, and many are simply inaccurate.[2]

1

The record of the first criminal trial was not admitted in evidence in this civil rights case; nor was the criminal case retried. J.A. 223.

2

While irrelevant to the issues on appeal, the inaccuracies are too blatant to ignore. For example, there was a conflict between the experts as to whether the bullet entered Carole Carter's neck and exited behind her right ear as she was lying on her back with her head on a pillow, consistent with the physical evidence and the defense theory of self-inflicted wound, or whether the bullet entered behind her right ear and exited her neck, as she testified.

Also, Carter was not "forced" to sell his mansion in Middleburg because of a property settlement in favor of Carole Carter. In fact, the property issues in the bifurcated divorce proceeding were not decided by the divorce court until February 1988, over six months after the shooting. A contract to sell the mansion and farm was agreed to by both parties about two months prior to the shooting with the closing scheduled for the first of September 1987. Depression over having soon to move out of her beloved mansion likely contributed to Carole shooting herself on July 31, 1987.

For example, respondent Burch insists the Poppa evidence was not material despite the fact the jury found it so (as did Judge Sinclair in the habeas corpus case). Even his co-defendant Deputy Sheriff Vernon Beamer admitted in testimony at trial that the Poppa evidence was both "important" and "exculpatory," and that it would have helped Carter in the first criminal trial. J.A. 343.

Likewise, Deputy Sheriff Beamer's knowledge of the Poppa evidence on September 2, 1987, is irrelevant to the issues presented in this petition concerning the scope of prosecutor Burch's absolute immunity. The jury obviously found that Beamer did have such knowledge in holding him liable. Respondent Burch's quibbling about witnesses' memories of the precise time a particular conversation occurred almost six years previously further undermines his contention that the Poppa evidence was not material. In fact, Beamer's jail house conversation of September 2, 1987 -- that if the Poppa evidence gets out "it would blow your case" -- merely reinforces that the Poppa evidence was materially exculpatory. The jury verdict against Beamer establishes that neither witness Howard Fry nor

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More egregious still are the statements of fact concerning the scratches. There was no evidence of any scratches "oozing" on Carter's face the next morning. Only a small horizontal scratch, similar to a razor cut, was found on Carter's chin the following afternoon, and this was entirely inconsistent with Carole's testimony that she "raked" his face and arm with her fingernails. Furthermore, an expert testified that the scratches on Carter's shoulder and arm were inconsistent with fingernail scratches and consistent with his explanation of riding his tractor inadvertently into a tree limb the day before the shooting.

Carter are "liars", as Burch would wish, and that the Poppa evidence is materially exculpatory.

ARGUMENT

1. RESPONDENT BURCH PRESENTS NO PRE-1871 COMMON LAW PRECEDENT AND ARTICULATES NO POLICY JUSTIFICATION TO SUPPORT ABSOLUTE IMMUNITY FOR WITHHOLDING MATERIALLY EXCULPATORY EVIDENCE.

As a substitute for any reasoned analysis, Burch merely concludes he is entitled to absolute immunity because of his status as a prosecutor, ignoring the "functional" test for determining absolute immunity.

Incredibly, prosecutor Burch argues that the out-of-court conduct of withholding materially exculpatory evidence from a criminal defendant in violation of *Brady v. Maryland*, 373 U.S. 83 (1963) is the "flip side" of the decision to present evidence in court. He equates the advocates decision whether to present evidence in court with the administrative decision to withhold knowledge of the existence of materially exculpatory evidence from a defendant prior to trial and subsequent to trial. This confused reasoning ignores the mandatory nature of the duty to disclose to the defense in discovery materially exculpatory evidence for use by the defense in court. This non-discretionary duty differs markedly from a prosecutor's trial advocacy decisions concerning whether and how particular evidence should be presented and handled in court.

It can not be questioned that whether to turn over

materially exculpatory evidence to the defense is mandatory and not subject to a prosecutor's discretion. *Brady v. Maryland, supra* at 87; ABA Code of Professional Responsibility, Ethical Considerations, E.C. 7-13; Disciplinary Rules, D.R. 7-103(B). This is unlike the trial advocate's discretionary decision regarding how to use evidence at trial.

Respondent also sees no "analytical distinction" between the allegations here and the prosecution not presenting evidence at a hearing to obtain a search warrant in *Burns v. Reed*, 500 U.S. 478 (1991).[3] However, in *Burns* the defense was well aware of the exculpatory evidence that the confession was obtained through hypnosis. As a result, the defense was able to present this evidence to the court which in turn dismissed the charges against Burns. Thus, *Burns v. Reed* involved no suppression of evidence from the defendant, the issue involved here.

The evil in withholding materially exculpatory evidence from the defense is that the defendant is denied the opportunity to present such evidence to the court and the adversary system is denied the opportunity to determine the truth. Justice is

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[3] In a concurring opinion, Justice Scalia took issue with granting absolute immunity to the function of wrongfully procuring a search warrant because absolute immunity for this function did not exist in 1871 when Section 1983 was enacted and because procuring a search warrant is further removed from the judicial phase of a criminal prosecution than procuring an indictment, citing *Malley v. Briggs*, 475 U.S. 335 (1986)(denying absolute immunity to policemen for procuring arrest warrant).

denied when the prosecutor unfairly withholds evidence which a defendant could use to establish his claim of innocence.

Respondent Burch fails to recognize the conflict between the Fourth Circuit opinion in this case and *Houston v. Partee*, 978 F.2d 362 (7th Cir. 1992) *cert. denied*, 507 U.S. ___, 123 L.Ed.2d 269, 113 S.Ct. 1647 (1993), where both the district court and the Seventh Circuit held prosecutors liable for suppression of evidence first learned post-conviction. The fact that the prosecutors sued were not "personally" handling the appeal within the prosecutor's office is hardly material to the court's holding. Indeed, the district court's opinion, which was affirmed, did not even refer to the fact that the defendant prosecutors were not personally prosecuting the appeal of the underlying criminal case. 758 F. Supp. 1228 (N.D. Ill. 1991). This tenuous distinction makes no legal difference because suppressing evidence involves no advocacy role whatsoever. The duty to turn over materially exculpatory evidence derives from the ethical duty of prosecutors as administrators of justice.

Respondent Burch correctly notes that after the Sixth Circuit's decision in *Hilliard v. Williams*, 516 F.2d 1344 (6th Cir. 1975), this Court remanded for further consideration in light of *Imbler v. Pachtman*, 424 U.S. 411 (1976). 424 U.S. 961 (1976). In *Imbler*, Justice White commented favorably upon the Sixth Circuit *Hilliard* opinion.[4] Nevertheless, on remand, the

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[4] Citing *Hilliard*, Justice White noted the injury to a defendant caused by unconstitutional suppression of exculpatory evidence is "substantial." On the other hand, "it is virtually impossible to identify any injury to the judicial process resulting from a rule permitting suits for such

state prosecutor was accorded absolute immunity when the court failed to see the distinction between that case and *Imbler*. 540 F.2d 220 (6th Cir. 1976). *Hilliard* did not come back to this Court for further review.

In contrast, the D.C. Circuit saw a clear distinction between the conduct accorded absolute immunity in *Imbler* and a federal prosecutor withholding exculpatory evidence in *Briggs v. Goodwin*, 569 F.2d 10 (D.C. Cir. 1977), *cert. denied*, 437 U.S. 904 (1978). There, the court properly denied absolute immunity to a prosecutor for withholding exculpatory evidence from the defense and the court. This is the same conduct involved in *Hilliard*.

In *Briggs*, defense counsel moved for disclosure of any agents or informers among witnesses subpoenaed to a grand jury. In open court, the prosecutor was questioned under oath and answered that no witnesses represented by counsel were agents or informants of the government. A year later, in written materials turned over under the Jencks Act, 18 U.S.C. 3500 (1970), the defense learned that one of the witnesses had been functioning as a paid FBI informant. In the subsequent civil suit, the D.C. Circuit, relying upon *Imbler*, held that the prosecutor was entitled to qualified immunity only because he was functioning as an investigator, rather than as an advocate, in withholding the exculpatory information from the defense.

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unconstitutional conduct, and it is very easy to identify an injury to the process resulting from a rule which does not permit such suits. Where the reason for the rule extending absolute immunity to prosecutors disappears, it would truly be 'monstrous to deny recovery.' [citation omitted]." 424 U.S. at 444-45.

Following Justice Powell's reasoning in *Imbler*, the court noted that while some functions in preparation of trial might be absolutely immune, others are not. The court concluded that "absolute immunity under *Imbler* extends only so far as necessary to protect a prosecutor's decision with respect to the initiation and conduct of particular cases." 569 F.2d at 20.

The D.C. Circuit held the disclosure of the government informants in that case was a mandatory duty, not subject to a prosecutor's discretionary "quasi-judicial" decision. Thus, there was no justification to protect such conduct from absolute immunity.

> The obligation to disclose, pursuant to judicial direction, the presence of Government informants among those subpoenaed to testify before the grand jury is entirely foreign to advocacy issues such as whether to initiate a prosecution or how to conduct a prosecution once begun. Such disclosure was, rather, an action required of appellant by the court in order to enable the court to deal with a possible defect in the conditions under which subpoena compulsions had been brought to bear in the grand jury investigation.

569 F.2d at 21.

The present case is even stronger for denying absolute immunity because the conduct of prosecutor Burch occurred wholly outside the scope of any court proceeding. Whereas the prosecutor in *Briggs* withheld the information in testimony under oath in a court proceeding, thereby raising the issue of

witness as well as prosecutorial immunity, the D.C. Circuit recognized that the function performed was not advocacy, but rather investigatory, involved no quasi-judicial discretionary decision making, and warranted no absolute immunity. *A fortiori*, the wholly out-of-court conduct of prosecutor Burch in withholding the Poppa evidence warrants no absolute immunity in the present case.

The court in *Briggs* established a workable standard for determining which conduct preparatory to trial warrants absolute immunity and which conduct warrants only qualified immunity. Where the conduct involves no quasi-judicial decision making and where immunity is not necessary to protect a prosecutor's discretionary decisions with respect to initiation of charges and the conduct of the trial, absolute immunity is not justified for a prosecutor any more than any other executive official who enjoys only qualified immunity.

2. RESPONDENT BURCH IGNORES THE ANALYSIS AND HOLDING IN *BUCKLEY V. FITZSIMMONS* THAT A PROSECUTOR'S FABRICATION OF EVIDENCE IS NOT ABSOLUTELY IMMUNE.

Prosecutor Burch also incredibly sees no logical distinction between a prosecutor preparing a witness for trial and "coaching and instructing" a witness to perjure herself. Yet, such distinction is critical to the professional responsibilities of advocates. *See* ABA Code of Professional Responsibility, Ethical Considerations, E.C. 7-26; Disciplinary Rules, D.R. 7-102(A)(4).

Without any reasoned analysis, the respondent suggests

that the opportunity for prosecutors to be sued for improperly coaching witnesses would "thoroughly disrupt" the criminal justice system. However, improperly tampering with witnesses is already a basis for habeas corpus suits, and the criminal justice system has not been "thoroughly disrupted", but rather strengthened in its truth seeking function as a result. In a civil rights suit, the plaintiff has the added burden of proving the challenged conduct was done intentionally and willfully and resulted in provable damages. Moreover, conclusory and unsupportable allegations can be readily weeded out pretrial.

Respondent Burch ignores both the analysis and holding in *Buckley v. Fitzsimmons*, 113 S.Ct. 2606 (1993) that a prosecutor's out-of-court fabrication of evidence is not subject to absolute immunity any more than an investigator's fabrication of evidence is subject to absolute immunity. Rather, Burch claims the conspiracy allegations here are "thin," sidestepping the issues presented in this petition.

However, Carter's allegations of conspiracy to fabricate evidence in this case are fact specific. A detailed affidavit of the witness herself supports the allegation that Burch fabricated the testimony of witness Suzanne Culver by coaching and instructing her to deny that Carole Carter made a statement showing knowledge that her own .38 caliber was used in the shooting.

Respondent Burch relies upon *Burke v. Miller*, 580 F.2d 108 (4th Cir. 1978), *cert. denied*, 440 U.S. 930 (1978), which held that a witness medical examiner was absolutely immune from civil liability for testimony in court as well as conspiracy to present perjured testimony in court. This is the same immunity accorded witnesses in *Briscoe v. LaHue*, 460 U.S. 325 (1983). *Burke* did not deal with the *prosecutor's* immunity from

conspiracy to fabricate evidence and fabrication of evidence, the issues involved here.

CONCLUSION

Respondent Burch has presented no pre-1871 common law precedent and no policy to justify absolute immunity for his conduct of withholding materially exculpatory evidence pre-trial and post-trial and fabricating and conspiring to fabricate the testimony of Suzanne Culver.

Because the opinion of the Fourth Circuit substantially departs from the "functional" test for determining prosecutorial absolute immunity as set forth in *Imbler, Burns, and Buckley*, because the Fourth Circuit opinion conflicts substantially with sister circuits on these issues, and because prosecutorial abuse of power in withholding materially exculpatory evidence and fabricating and conspiring to fabricate evidence is a serious national problem which can and must be deterred by civil liability, this Court should grant this Petition for a Writ of Certiorari to the Fourth Circuit.

Respectfully submitted,
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